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## Remarks Delivered on the Occasion of the Seventy-Fifth Anniversary of Fordham Law School October 1, 1980

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# Remarks Delivered on the Occasion of the Seventy-Fifth Anniversary of Fordham Law School October 1, 1980

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## **Abstract**

Although my work is largely with international lawyers, I often meet lawyers from many walks of life and am struck by how many lawyers seem to doubt the very existence of international law. Layman though I am, I want to lay that misconception to rest. Law is the warp and woof of the fabric that binds us together. Law makes it possible for one hundred and fifty-four nations to deal cooperatively and peacefully with each other over a wide range of issues.

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## REMARKS DELIVERED ON THE OCCASION OF THE SEVENTY-FIFTH ANNIVERSARY OF FORDHAM LAW SCHOOL OCTOBER 1, 1980

*Ambassador Donald F. McHenry\**

Good lawyers are good problem solvers. They assist me in using the law to structure and guide our positions. At this level they give truth to Samuel Johnson's great compliment that "[t]he law is the last result of human wisdom acting upon human experience for the benefit of the public."<sup>1</sup> Dr. Johnson spoke of course of domestic law, but his words apply equally to international law as well.

That brings me to my second observation about lawyers. Although my work is largely with international lawyers, I often meet lawyers from many walks of life and am struck by how many lawyers seem to doubt the very existence of international law. Layman though I am, I want to lay that misconception to rest.

Contemporary international relations would be impossible without the very extensive body of law that governs the daily conduct of nations. Absent that law, international mail would not move; planes would not fly safely; shortwave radio would be a hopeless jumble of conflicting and overlapping signals; and there would be no basis for world-wide efforts to control infectious diseases, as there was when the World Health Organization successfully eliminated smallpox.

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1. H. PIOZZI, ANECDOTES OF SAMUEL JOHNSON 73 (1925).

Law is the warp and woof of the fabric that binds us together. Law makes it possible for one hundred and fifty-four nations to deal cooperatively and peacefully with each other over a wide range of issues. By treaty, by development of customary law, and by judicial decision, the world has evolved and continues to evolve legal norms to facilitate international intercourse and solve international problems. A burgeoning code of international law by treaty demonstrates that the world community is capable of timely response to contemporary needs. The thirty-fourth session of the United Nations General Assembly unanimously adopted a Convention Against the Taking of Hostages.<sup>2</sup> In 1967, the General Assembly approved the Outer Space Treaty which would place space beyond national sovereignty and stop the arms race in space before it could begin.<sup>3</sup>

In the 1960's the problem of aircraft hijacking became a source of concern for the entire international community. Between 1963 and 1971, under the auspices of the International Civil Aviation Organization, three multilateral treaties were concluded to combat various aspects of air piracy by providing for criminalization of offenses, mutual assistance and prosecution or extradition of offenders.<sup>4</sup> As a result, there was a marked decline in what had become an almost commonplace occurrence. The conventions established an international norm of behavior for states. In recent days, we have seen a reoccurrence of this phenomenon in terms of Cuban "refugees" seeking to return. It is important to note, however, that Cuba itself, although not a party to the multilateral treaties, has complied with the international norm by jailing and in one instance

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2. International Convention Against Taking of Hostages, G.A. Res. 34-146 adopted Dec. 17, 1979, *reprinted in* 1979 U.N.Y.B. \_\_\_\_.

3. Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies, *signed* Jan. 27, 1967, and *entered into force* Oct. 10, 1967, 18 U.S.T. 2410, T.I.A.S. No. 6347, 610 U.N.T.S. 205.

4. Convention on Offenses and Certain Other Acts Committed on Board Aircraft (Tokyo Convention), Sept. 14, 1963, 20 U.S.T. 2941, T.I.A.S. No. 6768, 704 U.N.T.S. 219, *reprinted in* 2 INT'L LEGAL MATS. 1042 (1963); Convention for the Suppression of Unlawful Seizure of Aircraft (Hague Convention), Dec. 16, 1970, 22 U.S.T. 1641, T.I.A.S. No. 7192, \_\_\_\_ U.N.T.S. \_\_\_\_, *reprinted in* 10 INT'L LEGAL MATS. 133 (1971); Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation (Montreal Convention), Sept. 23, 1971, 24 U.S.T. 565, T.I.A.S. No. 7570, \_\_\_\_ U.N.T.S. \_\_\_\_, *reprinted in* 10 INT'L LEGAL MATS. 1151 (1971).

returning offenders for trial in the United States.<sup>5</sup> By returning offenders for trial here, the Cubans have helped send a message that such acts cannot be tolerated.

The monumental effort to formulate a comprehensive Law of the Sea,<sup>6</sup> which will govern the rights and duties of states in the exploitation of three-quarters of the earth's surface, is widely perceived as second only to the drafting of the United Nations Charter as an elaboration of fundamental rules of behavior in a vital area. And under the leadership of Ambassador Eliot Richardson, major progress has been made in resolving the immense number of issues involved in the Law of the Sea Conference.

All of these areas touch the lives of each and every one of us. The on-going debate about the extraterritorial reach of United States' safety, health and environmental standards is a complex of international political and legal developments. These developments, along with human rights litigation in United States courts on behalf of foreign nationals<sup>7</sup> and civil damage suits pending against the Iranian Government by some of the Americans previously held hostage,<sup>8</sup> all cut across the imaginary line between international law and the daily legal practice of an American practitioner.

International law also touches the private practitioner in the field of international trade law. Professor Joseph C. Sweeney of Fordham University School of Law is a vital part of our team for the United Nations Commission on International Trade Law which has done admirable work in harmonizing and simplifying the law of international trade.<sup>9</sup>

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5. N.Y. Times, Oct. 14, 1980, at A1, col. 6.

6. The Third Law of the Sea Conference produced a draft Convention on the Law of the Sea which will be presented to the UN General Assembly during the Spring 1981 session. The draft is reprinted in 20 INT'L LEGAL MATS. 1129 (1980).

7. See, e.g., *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980); 4 FORDHAM INT'L L.J. 213 (1980); Kaufman, *A Legal Remedy for International Torture*, N.Y. Times, Nov. 9, 1980, § 6 (Magazine), at 44; *Foreign Victims Find U.S. Forums*, Nat'l L.J., Oct. 13, 1980, at 1, col. 4.

8. Suits against the Government of Iran, Ayatollah Ruhollah Khomeini and the militant students holding the embassy were filed on behalf of two hostages and eight other persons stationed at the embassy. The wife of the imprisoned State Department communications officer filed suit in the Federal District Court in South Carolina seeking \$1 billion in punitive damages. The aggregate of damages sought by all plaintiffs equals \$1.356 billion, to be satisfied out of the \$8 billion in blocked Iranian assets. N.Y. Times, May 21, 1980, at A11, col. 1.

9. See U.N. Commission on International Trade Law, G.A. Res. 2205 (XXI), adopted unanimously Dec. 17, 1966, reprinted in 1966 U.N.Y.B. 920-21.

I am aware of the positivist response which seeks to ignore the very substantial body of law to which I have already referred by asserting that in some way international law is unenforceable. The fact is that the overwhelming body of international law is rigorously followed every day by all states. There are some violations, however, and when they occur there is not necessarily an assured means of insisting on the observance of international law to the same extent that there is, or that we like to think there is, in our domestic law. This is not to say that there are no sanctions. In the first place, the breach of an obligation by a party may give rise to the right on the part of other parties to terminate the relationship. This is normally sanction enough. There are, moreover, legal enforcement mechanisms in the UN Charter that are invoked in response to certain violations of international law.<sup>10</sup> The imposition of sanctions against Rhodesia during its fourteen year rebellion was a case in point. Those sanctions did not bring Rhodesia's rebellion to an immediate end, but without those sanctions there would probably be no Zimbabwe today.<sup>11</sup> Furthermore, there are political sanctions available to penalize those who violate the law. Today many nations are increasingly willing to exert their political will singularly or jointly in order to condemn breaches of international law. The international community's attitude toward the Soviet Union in the post Afghanistan invasion period is one such example on which I shall speak later.

We are here today to commemorate the seventy-fifth anniversary of one of the great centers of learning. As we think back to 1905 when Fordham Law School was founded, we think back to an era of hope and optimism, an era in which the world believed that progress based on global stability could solve all problems. Much of that optimism came crashing down in the blood bath of World War I. It became apparent that the political stability on which hope was based was false and untenable. The intervening sixty years have seen repeated efforts by the international community to organize itself in a better way. The first such effort, the League of Nations, failed in part because of American non-participation. In 1945 we saw the launching of another great effort to build political institutions which could provide the stability on which progress for

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10. See, e.g., U.N. CHARTER arts. 39-42.

11. See generally Comment, *Sanctions and South Africa*, 19 HARV. INT'L L.J. 887, 896 nn.42-45 (1978). Zimbabwe entered the United Nations on Aug. 25, 1980.

all can be based. The judgment is not in yet on these efforts. All we can say for sure is that at the age of thirty-five the United Nations remains a dynamic institution reflecting global realities and a place where people can come together to seek common solutions. We can also say that the stakes have become much greater. In 1905 or 1920 the belief that progress could alleviate the sufferings of the many was only an act of faith. In 1914 and even in 1939 our capacity for self-destruction was appalling, but limited. Today, our capacity for self-destruction is total. We must recall the faith in man and progress of that earlier era, build on the experience of the intervening seventy-five years and never lose sight of what is at stake should we fail.

Our search for a new stability will depend in large measure on how we handle nationalism. The process is complex and we must not be distracted by passing phenomena. One of the most interesting things that happened after the Soviet invasion of Afghanistan was the discovery by the American press of a new, anti-Soviet majority at the United Nations. The Soviets suffered an overwhelming defeat when the General Assembly called for the withdrawal of Russian troops from Afghanistan.<sup>12</sup> That defeat was the kind of political sanction for the violation of law to which I earlier referred. The defeat of Cuba's bid for a Security Council seat was a related political sanction. Yet even these reactions must be seen in context. At the time, several respected columnists proclaimed that the members of the nonaligned group had finally seen the light about the Russians. The writers predicted that these countries had, or soon would, shift their allegiance from East to West. There was a particular irony about these predictions. Only a few weeks before they appeared, the same press corps was decrying the Third World's consistent anti-American stand. The New York Times Magazine had just published an article entitled *How the Third World Runs the U.N.*<sup>13</sup> The article was reminiscent of the speeches about the "Tyranny of the Majority" that one of my predecessors used to deliver when he represented our country at what he later called "a very dangerous place."<sup>14</sup> Its premise was that the newest members

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12. G.A. Res. A/RES/ES-6/2, Jan. 14, 1980, reprinted in 80 DEP'T STATE BULL. 73 (Feb. 1980). The General Assembly recently repeated its call for the Soviet Union to withdraw its troops. The tone, however, was softer. N.Y. Times, Nov. 20, 1980, at A1, col. 2.

13. N.Y. Times, Dec. 16, 1979, § 6 (magazine), at 36-37.

14. See D. MOYNIHAN, A DANGEROUS PLACE (1978).

of the United Nations were using the organization to "achieve objectives that threaten American interests and challenge American power."<sup>15</sup>

I never shared the view that there was an automatic anti-American majority at the United Nations. But neither is there a new anti-Soviet majority. Both of these positions reflect an American tendency to see everything that happens in the world in the context of East-West confrontation. This tendency prevents us from understanding the political underpinnings of the nonaligned movement, and hinders effective dealings between the United States and the Third World.

For the past three decades, the most massive, far-reaching revolution in all of history has been taking place in the Third World. I am, of course, referring to the dismemberment of the world's colonial empires, the birth of almost one hundred independent nations, and the rise of Third World nationalism.

The United States helped plant the seeds of this revolution by insisting that the United Nations Charter endorse the right of all people to self-determination.<sup>16</sup> We could have done nothing else without being a traitor to our history and our *raison d'être*. Yet we do not seem fully ready to accept the logical consequences of that revolution. As a result of the emergence of strong nationalistic sentiment in the Third World, it is necessary for Americans to revise their conception of the international power structure and the reasons behind many current trends and events. We have to reassess what it means when on occasion we find ourselves in the minority, and on occasion the Soviets in the majority, on certain highly publicized issues that arise in the United Nations and other global forums.

The world that emerged from the chaos of World War II was bipolar, dominated by the two superpowers and the alliances that grew up around them. Much of the rest of the world was still under colonial administration. As nations came into being, they were denominated "pro-American" or "pro-Soviet" depending on whether they were perceived as more closely aligned with one bloc or the other.

In the 1950's, three Third World leaders—Marshall Tito of Yugoslavia, President Nasser of Egypt, and Prime Minister Nehru

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15. N.Y. Times, Dec. 16, 1979, § 6 (magazine), at 37.

16. U.N. CHARTER art. 1, cl. 2.



of India—began to question whether the interests of developing countries were well served by identifying them with one camp or the other. These leaders felt that progress on matters of great importance to developing countries, such as economic development, would always take a back seat to superpower politics within the rigid bipolar structure of the post-war world. Thus these Third World leaders announced that they would separate themselves from both superpower blocs and pursue their own interests independently—accepting political support and practical assistance wherever they might find it in the developed world. That was the genesis of the nonaligned movement, and that remains its premise.

The nonaligned group now has over one hundred and twenty members. It is not monolithic. It consists of large and small states, with various levels of resources, at various stages of development. Some are hardly nonaligned. Some of its members are extremely poor; others are extremely rich. On many international questions, their views and votes diverge widely. The adhesive that binds this nonaligned group together is a common position on the three issues that form the priority agenda of Third World concerns. These issues are: 1) the end of colonialism and racism; 2) self-determination for all people, including the Palestinians and South African Blacks; and 3) realignment of the global economy to ensure a more fair allocation of resources to all nations.

To recite the Third World's priority agenda is to understand why it sometimes seems to Americans that the nonaligned group is not truly nonaligned. On certain highly publicized issues—Southern Africa, the Middle East, and international economic reform—the Third World and Western states espouse different points of view, and the Soviet Bloc lines up behind the Third World. This is hardly a coincidence. On every one of these issues, the United States and other Western nations have important interests at stake—strategic interests and economic investment in many areas and moral commitments to Israel in the Middle East. We must always weigh those interests in the balance when voting on these questions where Third World passions run high.

The Soviet Union, by contrast, has little or nothing of strategic or economic value invested in the developing countries. It therefore has nothing to lose by aligning itself against us on major Third World issues. Nonetheless, the United Nations is not run by a voting trust consisting of the Eastern bloc and the Third World. Recent events clearly demonstrate that the vaunted alliance be-

tween the Russians and the nonaligned movement simply does not exist. Last year, for example, the Third World specifically rebuffed overtures to formalize any relationship between itself and the Soviet Bloc. At the Nonaligned Conference in Havana, member nations refused to adopt a resolution advocated by Cuba that would have recognized the Soviet Union and its Warsaw Pact satellites as the "natural allies" of the Third World.

The nonaligned states, moreover, have not shied away from opposing Soviet positions when they perceived their interests to be at stake. They joined the United States in condemning the invasion of Kampuchea by the Soviet-backed government of Vietnam, and, like us, they have refused to recognize the regime installed there by the Vietnamese. They are increasingly critical of Soviet protestations that the Eastern bloc states have no obligation to contribute more than verbal support to Third World development. Even before the invasion of Afghanistan, a significant number of nonaligned states refused to support Cuba's candidacy for a seat on the United Nations Security Council. They were concerned that Cuba, despite its position as head of the nonaligned movement, would not promote truly nonaligned positions. Cuba's refusal to condemn the invasion led to loss of support from already suspicious countries, forced Cuba to withdraw its candidacy, and severely undermined Cuba's influence in the nonaligned movement.<sup>17</sup>

If it is wrong to assume that Soviet solidarity with the Third World on many issues implies a nonaligned tilt to the East, it is equally erroneous to view the lopsided General Assembly vote on Afghanistan, or the earlier vote on Kampuchea as harbingers of a Third-World/Western bloc alliance. Without question, the Afghan incident has had a profound effect on Third World thinking. The preeminent concern in the Third World is that every nation respect the sovereignty and territorial integrity of all others. Most of the nonaligned are former colonies. They are deeply suspicious of any threat to their independence. Russian tanks on nonaligned territory represent a challenge to the principles which the nonaligned hold most dearly. These concerns, however, have not expanded the Western Bloc by eighty-five or ninety members. Rather, they have led to expressions of Third World nationalism that happen to coincide with our own national interests.

The nonaligned nations are as much wedded to the principle

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17. See N.Y. Times, Oct. 21, 1980, at A4, col. 3-4.

of independence from either bloc now as they ever were. They will continue to vote in light of what they perceive are their interests, without regard to the impact their votes will have on superpower politics. As the Third World has not abandoned the principle of nonalignment, we can expect the members of the nonaligned bloc to continue to vote differently than we do on all the issues on which our interests have heretofore diverged.

The Afghan invasion, for example, will not cause the Third World states to abandon their quest for a full economic boycott of South Africa as a protest against apartheid. Although American and British efforts to find peaceful paths of independence for the people of Zimbabwe and Namibia are much appreciated by the Third World, particularly the Africans, the developing states will continue to object to our relations with the South African Government, and particularly our continuing trade relations with that country. Neither will the nonaligned abandon their campaign against Israel over the Palestinian question. The United States cannot and will not accept the Third World's characterization of Zionism as racism, or of the Arab-Israeli dispute as a colonial issue, or the denunciation by some of the Camp David accords and the Israeli-Egyptian peace treaty.<sup>18</sup> Thus, we are likely to remain at loggerheads on these questions for quite some time, even if the Palestinian autonomy talks are successful.

The developing nations resent the role they believe they were programmed to play when the Western powers created the postwar international economic order. They see themselves as locked into an unenviable position. On the one hand, they produce raw materials for which they are paid low prices that fluctuate widely with cyclical reactions in the developed world. On the other hand, they are purchasers of manufactured goods, the cost of which continues to rise, without correlation to the cost of raw materials. Third World countries want to break out of that pattern and use their resources to become exporters of the manufactured goods and to command better prices for their raw materials. Since they cannot find a way to change their position in the context of the existing global economy, they want to change the rules. Thus, the Third World's call for a "new international economic order" to replace the one set

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18. Treaty of Peace between Egypt and Israel, March 26, 1979, \_\_\_\_ U.N.T.S. \_\_\_\_, *reprinted in* Documents Pertaining to the Conclusion of Peace (Embassy of Israel: Washington, D.C.) (1979); N.Y. Times, Mar. 27, 1979, at A14-16.

up when most of the nonaligned were still colonies will occupy center stage at the United Nations for the next few years. These are not East-West issues on which the nonaligned are lining up with the Soviet Union against the United States. They are Third World issues on which the Soviets take a pro-Third World position, because they have nothing to lose by doing so, and because they wish to be on the winning side of a popular cause. More and more, however, Soviet interests will conflict with the principles espoused by the nonaligned—as they did in Afghanistan and Kampuchea, and as they do whenever the Soviet Union is asked to contribute more than rhetorical support to Third World development. When that happens, the Soviets will vote according to their own interests, and we will side with the majority.

Americans should not conclude that the United States has no voice in the United Nations, or that it and similar organizations are inimical to our interests, simply because we are on the losing side of these votes. The United States does not want the Third World nations to become client states that will support our positions simply because they are American, or that oppose Soviet viewpoints for the sake of voting against the Russians. Whatever our differences on these issues, we should at least respect the nationalistic impulses among the nonaligned that contribute to the positions they take.

Our vision of the United Nations, and the judgment we pass upon it, must be more sophisticated. Ideally, the United Nations should provide a forum in which cooperation and moral suasion can prevail to defuse volatile situations. The ideal is only attainable if nations take positions on issues on the basis of careful analysis of the principles involved. There should be no room at the United Nations for knee jerk reactions and votes based on preconceptions set in concrete, whether those preconceptions are pro-American, pro-Soviet or pro-Third World. Judged against this standard, the United Nations can still be found wanting.

The Third World cast its vote on Afghanistan based on principle, and our interests were served in the process. It has happened before—witness Iran and Kampuchea. It happens over and over again. Indeed, we are on the winning side of United Nations' votes more often than we are losers, largely because we are more principled in our positions than the Soviets. Against such a standard it is obviously unfair and excessive to call the United Nations "a very dangerous place."

What I hope is developing and what we must strive to develop is a stable international society. The emergence of the Third World is our best hope for stability. Stability cannot be based only on the balance of power among the few, for history has shown us that such stability is short lived. What we have now, at last, is the possibility of international stability based on the interest and participation of all. Not the stability of a brokered deal among the few which fails if any party to it has a whim, but a stability so broad in its base that it cannot fail. It is to that end we must labor. As we come to understand the nature, hopes and aspirations of the Third World, we shall see more clearly the road to that broad-based stability. On that political stability we can deliver for ourselves and others on the hopes that existed in 1905 and which can, in the next seventy-five years, become the reality of an interdependent world. I do not say we are certain to succeed, or that we can drop our guard against those who would wish us ill. If we remain strong and maintain our vision, the United States has a major role to play in moving toward that world. Let us hope that we make it—well before the one hundred and fiftieth anniversary of Fordham Law School.

